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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Dennis Eugene Kuhlman

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EXAMINER

SIMMONS WILLIS, TRACEY A

ART UNIT

PAPER NUMBER

1619

MAIL DATE

DELIVERY MODE

08/11/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/797,981	Applicant(s) KUHLMAN ET AL.	
	Examiner TRACEY SIMMONS WILLIS	Art Unit 1619	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 April 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6,9 and 15-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6, 9, and 15-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Status of the Claims

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on April 17, 2009 has been entered.

Applicant's amendments filed April 17, 2009 to claims 1, 15, and 19 have been entered. Claims 7-8, 10-14, and 20 have been cancelled. Claims 1-6, 9, and 15-19 remain pending in the current application and are being considered on their merits.

Claim Objections

Claim 1 is objected to because of the following informalities: Applicant has an acronym, "BYV", within the claim used as a functional limitation of the claim. Examiner recommends writing out the words as represented by the acronym to distinctly define what is meant by "BYV", to further clarify the limitation. Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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Claim 1 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The instant claim recites functional language pertaining to the yield value and lather volume; however, the instant specification does not disclose how the structural limitations of the claimed invention correlate to the recited function. Examples provided in the instant specification [pgs 14-15, Examples 1-8] do not indicate the level of lather volume or yield values obtained from the compositions or their components, and the skilled artisan would not have been able to reasonably ascertain how the recited lather volume and yield values would be obtained from the compositions disclosed.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 3, 4, 6, 9, 17, and 18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 3 recites the limitation “alkyl substitution” on line 1 of the claim. There is insufficient antecedent basis for this limitation in the claim. Claim 3 depends on claim 1 which further defines the “alkyl substitution” of an alkyl ethoxylated polymer; however the alkyl

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ethoxylated polymer of claim 1 does not appear to require any alkyl substitution. Clarification is required.

Claims 3 and 4 each recite the limitation “alkyl substitution” on line 1 of the claims. There is insufficient antecedent basis for this limitation in the claim. Claims 3 and 4 each depend on claim 1, and each of claims 3 and 4 further define the “alkyl substitution” of an alkyl ethoxylated polymer; however the alkyl ethoxylated polymer of claim 1 does not appear to require any alkyl substitution. Clarification is required.

Claim 6 recites the limitation “the number of the number of moles of ethylene oxide” in the claim. There is insufficient antecedent basis for this limitation in the claim. Claim 6 depends on claims 1 and 4 which do not require do not require “moles of ethylene oxide”. Clarification is required.

Claim 9 recites the limitation “co-polymers” in the claim. There is insufficient antecedent basis for this limitation in the claim. Claim 9 depends on claim 1 which requires a “co-polymer” selected from a group, implying only 1 co-polymer is required. Claim 9 seems to require at least 2 co-polymers not required by claim 1. Clarification is required.

Claim 17 recites the limitation “the surfactants” in line 1 of the claim. There is insufficient antecedent basis for this limitation in the claim. Claim 17 depends on claim 1 which requires “a lathering surfactant” selected from a group, implying only 1 surfactant is required. Claim 17 seems to require at least 2 lathering surfactants not required by claim 1. Clarification is required.

Claim 18 recites the limitation “anionic lathering surfactants selected from the group” in line 2 of the claim. There is insufficient antecedent basis for this limitation in the claim. Claim

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18 depends on claim 1 which requires “a lathering surfactant” selected from a group, implying only 1 surfactant is required. Claim 18 seems to require at least 2 anionic lathering surfactants not required by claim 1.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 2, 3, 5, 9, and 15-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 5,674,509 (1997, Date et al) in view of US 5,869,441 (1999, Fair et al) and U.S. Patent 6,635,702 (2003, Schmucker-Castner et al).

The instant claims recite a lathering personal cleansing composition comprising an alkyl ethoxylated polymer, cross-linked acid co-polymer, particulate material, and a lathering surfactant with a specified average lather volume and yield value. The claims further define the

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alkyl ethoxylated polymer, cross-linked acid co-polymer, and lathering surfactant, and further define the lather volume and yield value.

Date teaches a skin care composition comprising 0.1% steareth-100 (a C₁₈ linear mono-alkyl substituted ethoxylated polymer), CARBOPOL 1342 and 951, cross-linked acid copolymers, at 0.185% combined, particulate material dimethicone at 3.3%, and 6% ARLATONE 2121 (sucrose cocoate and sorbitan stearate) as the lathering surfactant [col 10, Example 1]. *claims 1, 2, 3, and 5*

Date does not teach the Average Lather Volume of the lathering personal cleansing composition as being equal to or greater than about 15 ml or that the lathering personal cleansing composition has a BYV greater than 50 dyn/cm². Date also does not teach of alkali-swelling acrylate copolymers, of the level of surfactant from about 6 to 25% weight, of a selected group of anionic lathering surfactants, or of the anionic to amphoteric/zwitterionic surfactant ratio from about 1.5:1 to about 1:3

Fair teaches wash beauty bar compositions that increase the lather through the use of anionic and zwitterionic lathering surfactants. The compositions comprise EDTA-derived surfactants, anionic and amphoteric surfactants [col 1, lines 6-10]. The composition can contain 1-40% anionic surfactant and 1-20% amphoteric and/or zwitterionic surfactant [col 3, lines 53 and 60]. The ratio of the two surfactants ranges from 1:1 to 2:1, anionic:amphoteric/zwitterionic based on the disclosed percentages (1%:1% to 40%:20%), which overlaps with the recited ranges of claim 17. Fair further teaches anionic surfactants that include sulfonates and isethionates [col 5, line 6 and col 6 lines 6-7]. *claim 18* The lather volume is dependant on the presence of the anionic surfactant and the amphoteric/zwitterionic surfactants which can be balanced and

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adjusted depending on the other components and lathering volumes of over 200 ml can be achieved [col 13, Table 4]. *claims 1, 15, and 16*

Schmucker-Castner teaches of stable aqueous compositions comprising a crosslinked alkali-swellable acrylate polymer rheology modifier. *claim 9* One embodiment discloses 4% of an acrylate crosspolymer, sodium laureth sulfate surfactant, and insoluble pearlizing agent, the composition has an overall yield value (BYV) of 140-160 dynes/cm² [col 15, Example 1]. *claims 1 and 19*

One of ordinary skill in the art at the time of the invention would have found it *prima facie* obvious to determine suitable ratios of anionic and amphoteric/zwitterionic surfactants through routine or manipulative experimentation to provide the desired level of lather with minimal irritation to the skin [Fair, col 3, lines 56-57 and 63-64], particularly as these are variable parameters attainable within the art. Moreover, generally, differences in concentration, such as the ratio between the surfactants will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456; 105 USPQ 233, 235 (CCPA 1955). Applicants have not demonstrated any unexpected or unusual results, which accrue from the instant percentage ranges.

One of ordinary skill in the art at the time of the invention would have found it *prima facie* obvious to add the alkali-swellable acrylate polymer rheology modifier of Schmucker-Castner to the invention of Date as the rheology modifier provides thickness, stability, and yield value to the composition.

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One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because of the benefits of increasing the lather in a skin cleaning composition by using a combination of both anionic and amphoteric/zwitterionic surfactants as taught by Fair and a rheology modifier as taught by Schmucker-Castner. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

Claims 4 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Date in view of Fair and Schmucker-Castner as applied to claims 1, 2, 3, 5, 9, and 15-19 above, and further in view of U.S. Patent 6,589,517 (McKelvey et al).

The recitation of the claims is as stated above. The claims further define the type of alkyl ethoxylated polymer.

The combined teachings of Date, Fair, and Schmucker-Castner are relied upon above.

None of the references teach di- or tri-substituted alkyl ethoxylated polymers, or greater than 40 moles of ethylene oxide.

McKelvey teaches hair care compositions. McKelvey teaches the use of alkyl ethoxylates that may be branched, linear, saturated or unsaturated [col 13, lines 44 and 53]. The named di- tri- and tetra- alkyl substituted ethoxylated polymers are GLUCAMATE 120, CROTHIX, PEG-75 dioleate, PEG 120 methyl glucoside dioleate and PEG 150 distearate [col 4, lines 54-63] all of which contain greater than 40 mol of ethylene oxide. McKelvey also teaches that these polymers are beneficial as thickeners in hair care compositions.

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It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a cleaning composition as taught by Date, Fair, and Schmucker-Castner and to have an alkyl substitution to include di- and tri-alkyl substituted ethoxylated polymers, as taught by McKelvey with a reasonable expectation of success, to optimize the viscosity of the composition. One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because McKelvey is in the hair composition art and exemplifies that any of the mono-, di-, or tri-alkyl substituted ethoxylated polymers are beneficial as thickeners in hair compositions. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

Response to Arguments

Applicant's arguments, filed February 19, 2009, with respect to the rejection(s) of claim(s) 1, 3, 5, and 10 under 102 (b) have been fully considered.

Applicant alleges Date does not teach of the limitations of claim 1, particularly the average lather volume (pg 6).

This argument is persuasive and as a result the rejection under 35 U.S.C. 102 (b) over the newly amended claims is withdrawn.

As a result, a new ground(s) of rejection as indicated above is made in view of the claim amendments.

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Applicant's arguments, filed February 19, 2009, with respect to the rejection(s) of claim(s) 1 and 9 (Date, NOVEON, and Patel), claim(s) 4, 6, and 8 (Date and McKelvey), and claim(s) 15-18 (Date and Fair) under 35 U.S.C. 103 (a) have been fully considered.

Applicant alleges Date, NOVEON, and Patel do not teach of a yield value greater than 50 dyne/cm² (pg 7), Date and McKelvey do not teach of average lather volume (pg 8), and Date and Fair do not teach yield value (pg 9).

These arguments have been carefully considered however are now moot due to the withdrawal of these rejections.

As a result, a new ground(s) of rejection as indicated above is made in view of the claim amendments.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to TRACEY SIMMONS WILLIS whose telephone number is (571)270-5861. The examiner can normally be reached on Mondays to Fridays from 8:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward, can be reached at (571)272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications

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may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/T. S.W./

Examiner, Art Unit 1619

/Anne Marie Grunberg/

Supervisory Patent Examiner, Art Unit 1638